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In the Supreme Court of the United States

OCTOBER TERM, 1970

No.——

UNITED STATES OF AMERICA AND COMMISSIONER OF INTERNAL REVENUE, PETITIONERS

v.

ANNE GOYNE MITCHELL, FRANCES ANGELLO, ET. AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the United States and the Commissioner of Internal Revenue, petitions for a writ of certiorari to review the judgments of the United States Court of Appeals for the Fifth Circuit in these two companion cases, which present substantially the same question.[1]

OPINIONS BELOW

The opinion of the court of appeals in *Mitchell and Sims* v. *Commissioner* (Appendix A–1, *infra,* pp. 17–27) is not yet officially reported. The findings of fact

[1] The cases are combined in this petition pursuant to Rule 23(5) of the Rules of this Court.

and opinion of the Tax Court (Appendix A–3, *infra*, pp. 30–47) are reported at 51 T.C. 641.[2]

The opinion of the court of appeals in *Angello* v. *Metropolitan Life Ins. Co. and United States* (Appendix B–1, *infra*, pp. 48–51) is not yet officially reported. The findings of fact and conclusions of law of the district court (Appendix B–3, *infra*, pp. 53–57) are not officially reported.

JURISDICTION

In *Mitchell* the judgment of the court of appeals was entered on June 23, 1970 (Appendix A–2, *infra*, pp. 28–29). In *Angello* the judgment of the court of appeals was entered on June 22, 1970 (Appendix B–2, *infra*, p. 52). On September 17, 1970, Mr. Justice Black extended the time for filing a petition for a writ of certiorari to and including October 5, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a married woman domiciled in the community property state of Louisiana is personally liable for federal income taxes on her vested one-half interest in community income realized during the existence of the community, if she subsequently renounces her community rights or fails to accept them expressly.

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[2] Jane Isabell Goyne Sims is a party only because she was a transferee without consideration of property previously owned by Mrs. Mitchell, and it is stipulated that a finding against Mrs. Mitchell will be binding against Mrs. Sims.

STATUTES INVOLVED

Internal Revenue Code of 1954 (26 U.S.C. (1958 ed.)):

> SEC. 1. TAX IMPOSED.
>
> (a) *Rates of Tax on Individuals.*—A tax is hereby imposed for each taxable year on the taxable income of every individual * * *.
>
> * * * * * *

Article 2410, Louisiana Civil Code:

> Both the wife and her heirs or assigns have the privilege of being able to exonerate themselves from the debts contracted during the marriage, by renouncing the partnership or community of gains.

STATEMENT

1. MITCHELL

During the tax years in question, 1955 through 1959, Mrs. Mitchell resided with her husband in, and under the community property laws of, Louisiana. All income realized by both spouses in these years was community income.[3] Mrs. Mitchell was unaware of her husband's finances or how much money he made during this period and rarely knew the balance in the couple's joint bank account, although she withdrew community funds from the account for household purchases (R. 17–18, 37, 47, 50–51; Appendix A–3, *infra*, pp. 32–33.)[4]

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[3] During this period Mrs. Mitchell had personal earnings totalling about $4,200 from which income taxes were withheld.

[4] "R." references are to the separately bound Appendix for each case in the court of appeals.

Neither Mrs. Mitchell nor her husband filed joint or separate federal income tax returns for any of the five years in issue. Mrs. Mitchell relied on her husband's assurances that their tax returns were being timely filed and their taxes properly paid, assuming that he signed her name to the returns. In July 1960, she was informed that no returns had in fact been filed (R. 18, 37–38, 45–46, 51–52; Appendix A–3, *infra*, p. 33).

Mrs. Mitchell began living apart from her husband in July, 1960, and on September 14, 1961, she was judicially separated from him. On September 18, 1961, she formally renounced the community of acquets and gains pursuant to Article 2410 of the Louisiana Civil Code. She was divorced from her husband on October 11, 1962 (R. 17–18, 55; Appendix A–3, *infra*, pp. 33–34).

On September 30, 1966, the Commissioner determined deficiencies in income taxes and penalties against Mrs. Mitchell for one-half of the community income for the years 1955 through 1959. Mrs. Mitchell contested the Commissioner's determination by filing a petition in the Tax Court pursuant to Section 6214(a), Internal Revenue Code of 1954.

The Tax Court held that under Louisiana community property law Mrs. Mitchell had acquired an immediate vested ownership interest in one-half of the community property, including its income, and hence was personally responsible for the federal income tax on that share of the community income. The court ruled that the state law permitting a sub-

sequent renunciation of the community could not defeat the pre-existing federal tax liability (Appendix A–3, *infra*, pp. 30–47).[4] On appeal, the Fifth Circuit reversed, with one judge dissenting, holding that Mrs. Mitchell's renunciation of the community retroactively relieved her of the tax liabilities asserted by the Commissioner (Appendix A–1, *infra*, pp. 17–27).

2. ANGELLO

During the tax years in question, 1959 through 1961, Mrs. Angello resided with her then husband, Jack Sparacio, also in, and under the community property laws of, Louisiana. Although community income was realized in these years, neither Mrs. Angello nor her husband filed any income tax returns for these years. On February 19, 1965, the District Director of Internal Revenue made assessments against them for federal income tax liabilities for each of the three years involved (R. 19–20, 25; Appendix B–3, *infra*, p. 54).

The United States then filed a notice of federal tax lien with the Recorder of Mortgages, Parish of New Orleans, and thereafter addressed a notice of levy to Metropolitan Life Insurance Company, which had issued a policy to Mr. Sparacio. Mr. Sparacio

[4] The Tax Court also held respondent liable for the statutory penalties imposed under Sections 6651, 6653, and 6654 of the Code. Since the court of appeals reversed the Tax Court's initial finding with respect to income tax liability, it also overturned the penalties. We contend that, if Mrs. Mitchell is liable for the taxes, it follows that she is also liable for the penalties.

died and the notice of levy previously served on Metropolitan attached to the proceeds of Mr. Sparacio's policy. Mrs. Angello, as beneficiary of the policy, then filed suit in state court against Metropolitan seeking the proceeds. The United States intervened to assert its lien and, upon its motion, the case was removed to the federal district court.[6] After removal, Metropoltian paid the proceeds into the court registry and was dismissed from the case (R. 1-2, 21-23, 43-45; Appendix B-3, *infra*, pp. 53-54).

The district court granted the Government's motion for summary judgment, holding Mrs. Angello indebted to the United States for income taxes on her one-half of the community income for the years 1959 through 1961, and allowing collection of that amount out of the interpleaded funds (Appendix B-3, *infra*, pp. 53-57). Under the Louisiana law the interpleaded funds were Mrs. Angello's separate property. On appeal, the Fifth Circuit reversed, with one dissent, relying on the decision of the same panel in *Mitchell* (Appendix B-1, *infra*, pp. 48-51).[7]

REASONS FOR GRANTING THE WRIT

The decisions below conflict with this Court's holdings in *Poe* v. *Seaborn*, 282 U.S. 101, and its com-

[6] The district court had original jurisdiction under 28 U.S.C. 1346(a). Removal was had under 28 U.S.C. 1441.

[7] Although no formal statutory renunciation occurred in *Angello*, as in *Mitchell*, the court of appeals noted there was no evidence to indicate Mrs. Angello expressly accepted the benefits or liabilities of the community upon its dissolution and treated the case as presenting the same issue as, and thus controlled by the court's ruling in, *Mitchell* (Appendix B-2, *infra*, p. 50). The dissenting judge also accepted this characterization.

panion cases, and in *United States* v. *Malcolm*, 282 U.S. 792. If permitted to stand, these decisions pose a threat to the collection of income tax revenues in all states in which the community property system prevails.

1. *Seaborn* involved the determination of the proper federal income taxes payable by a husband and wife residing in Washington, one of the eight community property States.* For the year 1927 Seaborn and his wife made separate tax returns, each reporting one-half the total community income. The Commissioner determined that all of the income should have been reported in the husband's return, and Seaborn contested this determination. In construing the statutory predecessor of Section 1 of the 1954 Code, this Court observed that the tax is levied against the taxable income of every individual, and ruled that the use of the word "of" in the phrase "of every individual" (which survives) establishes ownership as the basis of liability. Upon analysis of the community property laws of Washington, the Court concluded that Mrs. Seaborn had a vested

*Seaborn was one of four cases instituted by the Government to determine whether, under the Revenue Act of 1926, married taxpayers in the States of Washington, Arizona, Texas, and Louisiana were entitled to split the community income equally for income tax purposes. *Poe* v. *Seaborn*, 282 U.S. 101 (Washington); *Goodell* v. *Koch*, 282 U.S. 118 (Arizona); *Hopkins* v. *Bacon*, 282 U.S. 122 (Texas); and *Bender* v. *Pfaff*, 282 U.S. 127 (Louisiana). The result was to allow married taxpayers in community property states to divide the community income equally between them, thus in effect forcing the amendment of the tax laws in 1948 to make "split incomes" available to all married taxpayers in order to avoid discrimination.

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property right in the income of the community, including salaries or wages of either spouse, equal with that of her husband. Since the incidence of the income tax follows the ownership of the income,[9] the Court sustained the separate reporting of equal parts of the total community income.

In *Bender* v. *Pfaff*, a companion case, this Court considered the question in the context of the law of Louisiana. In again upholding the right of spouses to split the community income, the Court made the following significant observations concerning Louisiana community property laws (282 U.S. at 131–132):

> If the test be, as we have held it is, ownership of the community income, this case is probably the strongest of those presented to us, in favor of the wife's ownership of one-half of that income. * * * The statutes speak of a marriage superinducing as a matter of right "partnership or community" of acquêts or gains. Repeatedly the statutes refer to the relation as a "partnership or community." The decisions of the Supreme Court of Louisiana clearly recognize the wife's ownership of one-half of all the community income. * * *
>
> While the husband is the manager of the affairs of the marital partnership, the limitations upon the wrongful exercise of his power over community property are more stringent than in many states which have a community system. * * *
>
> Inasmuch, therefore, as, in Louisiana, the wife has a present vested interest in commu-

[9] See *Lucas* v. *Earl*, 281 U.S. 111.

> nity property equal to that of her husband, we hold that the spouses are entitled to file separate returns * * *.

That the decisions in *Seaborn* and *Pfaff* not only *entitled* the wife to return one-half of the community income but also *required* that she do so was established in *United States* v. *Malcolm, supra.* The Ninth Circuit had certified to the Court two questions (282 U.S. at 793–794):

> 1. Under the applicable provisions of the Revenue Act of 1928 must the entire community income of a husband and wife domiciled in California be returned and the income tax thereon be paid by the husband?
>
> 2. Has the wife under § 161(a) of the Civil Code of California such an interest in the community income that she *should* separately report and pay tax on one-half of such income? [Emphasis supplied.]

On the authority of *Seaborn* and its companion cases, the Court answered the first question "No" and the second question "Yes."[10]

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[10] In two subsequent cases involving California residents the Ninth Circuit, citing *Malcolm*, ruled that the husband is obligated to return only one-half of the community income and stated that the other one-half of the community income is properly taxable to the wife. *Commissioner* v. *Cavanagh*, 125 F. 2d 366 (C.A. 9); *Van Antwerp* v. *United States*, 92 F. 2d 871 (C.A. 9). The Tax Court in *Cavanagh* discussed the impact of *Malcolm* as follows (42 B.T.A. at 1044):

"* * * income must be reported [for income tax] by the individual to whom the statute attributes it. Clearly, therefore, the petitioner's wife is taxable on one-half of the community income. She is the owner thereof, although not entitled to pres-

As stated by this Court in *Pfaff*, under Louisiana law the wife has a present, vested interest in community income equal to that of her husband and amounting to ownership. The wife is the "half-partner and owner of all acquisitions made during the existence of the community, *whether they be property or income.*" *Succession of Wiener*, 203 La. 649, 666, 14 So. 2d 475, 480–481. See also *United States Fid. & Guar. Co.* v. *Green*, 252 La. 227, 210 So. 2d 328; *Phillips* v. *Phillips*, 160 La. 813, 107 So. 584; *Dixon* v. *Dixon's Executors*, 4 La. 188. As the owner of one-half of the community income the wife is entitled to return that one-half for income tax (*Pfaff*) and, under the mandate of *Malcolm*, is *required* to do so. The Fifth Circuit, until the decisions in these cases, consistently "interpreted the decision of *Bender* v. *Pfaff* to mean that in Louisiana each spouse is liable for one-half of the tax falling upon community property." *Smith* v. *Donnelly*, 65 F. Supp. 415, 417 (E.D. La.). See *Commissioner* v. *Hyman*, 135 F. 2d 49 (C.A. 5); *Saenger* v. *Commissioner*, 69 F. 2d 633 (C.A. 5).

2. In the instant cases, the Fifth Circuit held, however, that the respondent wives are not liable for the tax attributable to one-half of the community

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ent possession. This appears to be the inescapable conclusion to be drawn from the Supreme Court's opinion in the *Malcolm* case, *supra*.

"Consequently, there is no longer the situation whereunder the wife may at her option return one-half of the income. Since she now must do so, it follows that the petitioner is taxable only on the other half of the entire community property. * * *"

income. Although recognizing that under Louisiana law the wife has a present, vested ownership interest in one-half of the community income, the court of appeals reasoned as follows: (a) it is the community, and not the wife individually, which owns the community income and owes the community debts; (b) as the owner of the income, the community owes the tax thereon as a community obligation; (c) such a community obligation "does not become [the wife's] separate obligation unless she expressly accepts such liability or accepts the benefits of the community upon its dissolution";[11] and (d) a wife cannot, therefore, be compelled to pay taxes on community income from her separate property unless she chooses to do so. The court distinguished *Seaborn* and *Pfaff* as holding only that the wife is *entitled* to report separately one-half of the community income, not that she is *required* to do so; and *Malcolm* and the prior Fifth Circuit decisions (*Hyman, Saenger,* and *Smith*) as cases in which the wife had signed a tax return and thus assumed the liability for the tax, so that her liability was not in dispute.

The marital community is not, however, a separate tax-paying entity under the Internal Revenue Code, and has never been recognized or held to be such by any federal court. On the contrary, the rationale of *Seaborn* and its companion cases is that the marital partners in Louisiana and the other community property states individually own their respective shares of the community income, and thus by operation of

[11] *Angello*, p. 50, *infra*. See p. 6, n. 7, *supra*.

law are individually taxable thereon.[12] Otherwise there would have been no basis for the income *splitting* allowed in *Seaborn*. The exoneration provisions of Article 2410 of the Louisiana Civil Code, upon which the court of appeals relied, do not impair the basic ownership interest of each of the marital partners, and once ownership of the income is established, no provision of state law can defeat the right of the United States,

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[12] The court of appeals made much of the wife's lack of control and management rights with respect to community property. *Mitchell*, pp. 21–22, 25–26, *infra*. In *Seaborn*, however, this Court considered and rejected a contention that because of this the wife's interest in community income is less than "ownership" and thus precludes taxing the wife on her share of community income, holding that while the husband in community property jurisdictions frequently has broad management powers, to the exclusion of the wife, he exercises such powers only as the agent of the community and is not thereby vested with ownership of the entire community, the wife retaining her present interest as a co-owner. 282 U.S. at 111–113.

In *Succession of Wiener*, *supra*, the Louisiana Supreme Court stated (203 La. at 669, 14 So. 2d at 481–482):

"* * * There is no substantial difference between her interest [in the marital community] and the interest of an ordinary member of a * * * partnership, the control and management of whose affairs has, by agreement, been entrusted to a managing partner." The analogy is apposite. A partnership does not pay income taxes. The partners are treated as the owners of their distributive shares of partnership income and are personally liable for the income taxes on these earnings. While the partnership may generate partnership income on which federal income taxes are payable, it is the partners individually, not the partnership, who are obligated to pay the tax. See Sections 701–704, Internal Revenue Code of 1954.

established by federal law, to collect the tax from the owner of the income. *United States* v. *Bess*, 357 U.S. 51, 56–57; *United States* v. *Dallas Nat'l Bank*, 152 F. 2d 582, 585 (C.A. 5); *Shambaugh* v. *Scofield*, 132 F. 2d 345, 346 (C.A. 5); cf. *Glass City Bank* v. *United States*, 326 U.S. 265.[13]

As the court of appeals recognized, the purpose of Article 2410 is to protect the wife's separate property from creditors' claims for community debts which the husband has incurred but did not satisfy. But, as we have explained, the tax obligations are from the start the separate obligations of the spouses under

[13] In *Shambaugh*, the Fifth Circuit ruled that the homestead exemption from forced sale under the Texas Constitution does not protect a Texas homestead from a sale under the federal tax laws to satisfy a federal tax lien. More recently the Ninth Circuit in companion cases, *United States* v. *Overman*, 424 F. 2d 1142 (C.A. 9), and *In re Ackerman*, 424 F. 2d 1148 (C.A. 9), held that Washington and Arizona state law exempting the husband's interest in community property from his premarital debts could not defeat the federal income tax assessment for a premarital tax liability.

The important fact is the court of appeals failed to recognize that the cases before it presented a question of *collection*, not *imposition*, of taxes. While state law controls the ownership of income, which in turn determines who is liable for the income taxes thereon, the federal tax laws control the collection of the taxes. Of course the wife, by renouncing or otherwise not accepting the benefits of the community, may thereby entitle the government to collect the taxes she owes from her husband as the transferee of her assets. See Section 6901, Internal Revenue Code of 1954. But the wife, as transferor, would remain primarily liable for the taxes assessed against her in the first instance as the owner of the income. The transferee provisions do not impose the liability, but merely provide a means for collecting it.

federal law, which does not consider them an obligation of the community as such. The husband has simply not incurred any debt with respect to the wife's share of the community income; while he acted—by working and being paid—to produce community income, the debt to the United States arises not from that but from the fact that income is owned individually by the two taxpayer members of the community. Having given the wife ownership of half of the income, Louisiana law cannot exempt her from the consequences that ownership has under the Internal Revenue Code. And the obligation she has from the start as a taxpayer is collectible from her own assets, just as are the tax obligations of any other person.[14]

3. The decisions below threaten the collection of revenues in all of the eight community property states. Under the rationale of the Fifth Circuit's opinions, if state law exempts the wife and her separate property from community debts, she is not liable for the income taxes on the one-half of the community income owned by her. In every community property jurisdiction the wife is not personally liable for, and her separate property cannot be taken in satisfaction of, community debts incurred by the

[14] Of course, this does not mean that the wife may not have a claim for reimbursement under state law, on the theory that—for state law purposes only—the federal taxes remain a community debt. The point is only that the wife cannot set up such a principle of state law as between herself and the federal government.

husband.[15] A refusal to tax the wife personally on her one-half of the community income may therefore be grounded on the decisions below in every community property state.

The court of appeals finds this a matter of little moment because it concludes that under Louisiana law the husband is personally liable for all community debts and therefore the Commissioner may collect from him personally the taxes on all community income (*Mitchell,* p. 27, *infra*). This proposition poses not only practical problems where collection cannot be had from the husband, as the instant cases illustrate, but also does not represent the prevailing law in other community property jurisdictions. *Malcolm* established that the husband, at least in California, is not required to report and pay the tax on the entire community income, but only the one-half that he owns personally. See also *Commissioner* v. *Cavanagh,* 125 F. 2d 366 (C.A. 9). Cf. *United States* v. *Overman,* 424 F. 2d 1142 (C.A. 9); and *In re Ackerman,* 424 F. 2d 1148 (C.A. 9). If the wife fails to file a joint or

[15] Although there are some differences and exceptions peculiar to each state, the general rule is as indicated. See generally:

Arizona: Ariz. Rev. Stat. Ann. § 25–318(F).

California: Calif. Civ. Code § 171.

Idaho: Idaho Code § 32–911.

Nevada: Nev. Rev. Stat. § 123.210.

New Mexico: N.M. Stat. 57–3–9.

Texas: Vernon's Tex. Family Code §§ 5.61–5.62.

Washington: Wash. Rev. Code Ann. § 26.16.020.

separate return and does not accept the liabilities o benefits of the community on its dissolution, one-hal of the community income would thus appear to es cape taxation.[16]

CONCLUSION

The petition for a writ of certiorari should b granted.

Respectfully submitted.

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OCTOBER 1970.

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[16] The opinions below raise numerous other administrative questions. For example, when the wife files a separate individual return reporting her separate income, can deficiencies then be asserted for her failure to report her share of the community income? If she reports part of her share of the community income, but not all, can deficiencies be asserted for the remainder? Clearly, the problems of administration resulting from these decisions are substantial.

APPENDIX A–1

In the United States Court of Appeals
for the Fifth Circuit

No. 28163

ANNE GOYNE MITCHELL, PETITIONER-APPELLANT

v.

COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT-APPELLEE

JANE ISABELL GOYNE SIMS, PETITIONER-APPELLANT

v.

COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT-APPELLEE

APPEALS FROM THE DECISIONS OF THE TAX COURT OF THE UNITED STATES (LOUISIANA CASE)

(June 23, 1970)

Before AINSWORTH, DYER and SIMPSON,
Circuit Judges

DYER, *Circuit Judge*: These appeals from the Tax Court involve the question of a wife's liability out of her separate property for federal income taxes on community income earned when she and her husband were residents and domiciliaries of Louisiana, a community property state. The Tax Court held that the wife is liable for the tax on one-half of all the community income regardless of whose efforts produced the income for the community and even though the wife did not file a return, renounced the community

and received none of the community property upon the dissolution of the community. The Tax Court also held the wife liable for statutory penalties imposed by §§ 6651, 6653 and 6654 of the Internal Revenue Code of 1954.[1] The Court further held the transferee of the wife's separate property liable for the taxes under § 6901 of the Code. We disagree on the initial question of the wife's liability for the taxes and therefore reverse on all issues.

Anne and Emmett Mitchell were married on September 22, 1946. During the taxable years in question they lived under the Louisiana community of acquets and gains. For the taxable years beginning January 1, 1955, and ending on December 31, 1959, neither Mrs. Mitchell nor her husband filed federal income tax returns. During 1955 and 1956 Mrs. Mitchell was employed as a teacher and received salaries of $2700 and $1500 for the respective years. Income taxes were withheld from this income. It was stipulated that during the years in question all the income earned by both Mrs. Mitchell and her husband constituted community income and the amount of this income is not in dispute. The Tax Court found as a matter of fact that Mrs. Mitchell did not know of her husband's finances and relied upon his assurances that their tax returns were timely filed and their taxes properly paid. She assumed that he signed her name to the income tax returns.

Mrs. Mitchell began living apart from her husband in July, 1960. On March 10, 1961, the Commissioner assessed income taxes and penalties against Mr. and

[1] Penalties under § 6651(a) are imposed for failure to file a return, under § 6653(a) for negligent failure to pay taxes that are due, and under § 6654 for failure to file estimated tax returns and pay the estimated taxes.

Mrs. Mitchell. It was stipulated that Mrs. Mitchell did not receive or have knowledge of this assessment. On September 4, 1961, Mr. and Mrs. Mitchell were judicially separated and on September 18, 1961, Mrs. Mitchell renounced the community of acquets and gains pursuant to Article 2410 of the Louisiana Civil Code.[2] Mr. and Mrs. Mitchell were divorced on October 11, 1962.

In 1964 Mrs. Mitchell inherited an undivided interest in her mother's estate. On December 23, 1964, she transferred this interest to her sister, Mrs. Jane Sims, without consideration. Thereafter, on September 30, 1966, the Commissioner determined that additional deficiencies existed.

The Tax Court held that under the Louisiana community property system the wife has such rights, claims and powers in the property and income of the marital community as are equivalent to ownership. This ownership interest made Mrs. Mitchell liable for one-half of the tax due on the community income for the period in question. The Court held that her renunciation of the community did not affect the tax liability because it read Article 2410 of the Louisiana Code as allowing the wife to exonerate herself solely from contractual debts of the community, whereas the tax liability was imposed by law.

The Tax Court also held Mrs. Mitchell liable for the penalties imposed by § 6651(a) of the 1954 Code for failure to file tax returns for the years in question because she did not have reasonable cause to rely on her husband's assertions that he had filed the returns. Penalties under § 6653(a) were also assessed

[2]Article 2410 provides: "Both the wife and her heirs or assigns have the privilege of being able to exonerate themselves from the debts contracted during the marriage, by renouncing the partnership or community of gains."

because the Tax Court held that she acted negligently in failing to pay taxes that were due. The Tax Court further imposed penalties under § 6654 for failing to file estimated tax returns and pay the estimated taxes for each of the years 1955 through 1959.[3]

It was stipulated by both parties in the Tax Court that if Mrs. Mitchell were liable out of her separate property then the transferee without consideration of that property would likewise be liable. The Tax Court therefore found Mrs. Sims, the transferee, liable.

It is, of course, incumbent on us to examine Louisiana law to determine the nature and extent of the community interest owned by the wife because the state law determination of this interest is binding on federal courts in the adjudication of federal tax controversies. *Poe* v. *Seaborn*, 1930, 282 U.S. 101, 51 S. Ct. 58, 75 L. Ed. 239; *Bender* v. *Pfaff*, 1930, 282 U.S. 127, 51 S. Ct. 64, 75 L. Ed. 252; *see also Commissioner* v. *Estate of Bosch*, 1967, 387 U.S. 456, 87 S. Ct. 1776, 18 L. Ed. 2d 886, and *Commissioner* v. *Hyman*, 5 Cir. 1943, 135 F. 2d 49.

Under Louisiana law the wife has a present, vested ownership interest in one-half of the community property, including its income. *United States Fidelity and Guaranty Co.* v. *Green*, 252 La. 227, 210 So. 2d 328 (1968); *Phillips* v. *Phillips*, 160 La. 813, 107 So. 584

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[3] The Court determined the total liabilities for the years in question as follows:

Year	Income tax	Addition to tax		
		§ 6651(a)	§ 6653(a)	§ 6654
1955	$323.00	$80.75	$16.15	.....
1956	1,267.75	316.93	63.39	$35.49
1957	453.00	113.25	22.65	12.68
1958	1,750.71	425.02	87.54	47.09
1959	871.34	173.24	43.57	17.27

plus interest on the above liabilities as provided by law from December 23, 1964, to the date of payment.

(1926). Because of this vested interest in the income the Commissioner contends that Mrs. Mitchell is liable individually, and out of her separate property, for income taxes on one-half of the community's income. However, the bare characterization of this ownership interest as vested is not determinative of the issue. Under the law of Louisiana the wife does not own the income in a separate capacity. She owns the income only derivatively through her one-half ownership interest in the community. It is the community which owns the income and owes the community debts. *Poe* v. *Seaborn, supra; Bender* v. *Pfaff, supra; Messersmith* v. *Messersmith,* 229 La. 495, 86 So. 2d. 169 (1956).

If the community owns the income it also owes the tax since it is axiomatic that income is taxed to the owner thereof. *Helvering* v. *Horst,* 1940, 311 U.S. 112, 61 S. Ct. 144, 85 L. Ed. 75. The Commissioner contends that the liability for income taxes is not a community debt. However, the Supreme Court of Louisiana held to the contrary in *Messersmith* v. *Messersmith, supra,* where the court said: "[A]ll sums expended for income tax * * * must be held to be debts of the community and to be payable out of community funds." *Id.* at 176. *See also Tate* v. *Tate,* 12 So. 2d 506 (La. Ct. App. 1943). Note, *Creditor's Rights,* 25 La. L. Rev. 201 (1964). The question then is whether we should "look through" the community concept and hold the wife liable for a community debt because she is the owner of an interest in the community.

The wife does not have control or management of the community property until dissolution of the community. *Agar* v. *Agar,* 239 La. 941, 120 So. 2d 485 (1960) and this is true even if the husband is absent from the home. *Grandeson* v. *International Harvester*

Credit Corp., 223 La. 504, 66 So. 2d 317 (1953). During the existence of the community the husband can alienate the property without her consent. La. Civ. Code Article 2404; *Pitre* v. *Pitre*, 247 La. 594, 172 So. 2d 693 (1965). As a corollary of his almost exclusive control over the community property the nature of the wife's interest in the community is such that the burdens cannot, unless she expressly binds herself, be satisfied out of her separate property. La. Civ. Code Article 2403. It is only when the community is dissolved and she does not renounce the community that the nature of her interest becomes such that it can burden her separate property. *Beal* v. *Ward*, 13 La. App. 191, 127 So. 423, 1930. Therefore, since income taxes on community income are community debts, *Messersmith, supra*, the wife's renunciation of the community is not academic. Mrs. Mitchell was not attempting to relieve herself of a debt which she had already incurred, as the Government argues, but was avoiding the assumption of a liability which was the liability of the community and which was to be acquitted out of community funds.

Article 2403 of the Louisiana Civil Code establishes the principle that there are separate debts and community debts which must be acquitted out of the respective funds:

> [T]he debts contracted during the marriage enter into the partnership or community of gains, and must be acquitted out of the common fund, whilst the debts of both husband and wife, anterior to the marriage, must be acquitted out of their own personal and individual effects.

See First National Bank of Abbeville v. *Broussard*, 202 La. 315, 11 So. 2d 602 (1942). The Louisiana courts have made it crystal clear that the wife's in-

terest in the community is such that she cannot be held liable out of her separate property for community debts. "[T]here are no principles more elementary, more fundamental, more firmly imbedded in the law of Louisiana, and more clearly understood, than the principle that the wife is not personally liable for a community debt * * *." *Smith* v. *Viser,* 117 So. 2d 673, 674 (La. Ct. App. 1960); *accord, Personal Finance, Inc.* v. *Simms,* 148 So. 2d 176 (La. Ct. App. 1962); *Brock Furniture Co.* v. *Carroll,* 86 So. 2d 715 (La. Ct. App. 1956).

Although the community is not a taxpayer the courts have recognized the underlying concept of the community as an entity in tax cases. *Commissioner* v. *Chase Manhattan Bank,* 5 Cir. 1958, 259 F. 2d 231; *see also Poe* v. *Seaborn, supra; Jefferson Lake Sulphur Co.* v. *Walet,* E.D. La. 1952, 104 F. Supp. 20, *aff'd* 202 F. 2d 433, *cert. den.* 346 U.S. 820 (1953). The Commissioner asserts that the entity concept is not pertinent because the community is similar to a partnership and the "pass through" provisions of partnership income taxation should apply. The community of acquests and gains, is, however, not similar to an ordinary commercial partnership because the wife may renounce it and thereby absolve herself of all debts of the community, retroactively. This difference was pointed out in *Brassac* v. *Ducros,* 4 Rob. 335, 339 (1843) where the Louisiana Supreme Court said:

> Such a partnership does exist in contemplation of law, but only, we apprehend, when she accepts the community; if she renounces it, the community is, as to her, as though it never existed, and everything done during the marriage in relation to the purchase or alienation of property must be considered as done by the husband alone.

The Commissioner relies on those United States Supreme Court cases[4] which held that the husband is not required to report the whole community income on his individual return as authority that the wife is liable for one-half of the taxes. This reliance is misplaced. *Bender* and *Poe* did not hold that the wife was *required* to report the income but rather that she had a sufficient interest in the community income to entitle her to report one-half of the community income. The real significance of the finding of a vested ownership in the wife in *Bender* was not to make her separately liable but to rebut the Commissioner's reliance there on cases such as *Lucas* v. *Earl,* 1930, 281 U.S. 111, 50 S. Ct. 241, 74 L. Ed. 731, where the factor of who earned the income was held determinative of who owed the tax.

The holding of *Bender* is consistent with Louisiana law. Where the husband and wife are living under the community of acquets and gains the wife may assume the liabilities of the community and be liable for such assumption out of her separate property. La. R.S. 9:103 (1950); *Friendly Loans, Inc.* v. *Morris,* 142 So. 2d 810 (La. Ct. App. 1962). But to extend *Bender* to *require* the wife to report the income would be destructive of the Louisiana system of community property without any clear statutory authorization. This we refuse to do.

The case at hand is also distinguishable from those cases cited by the Commissioner where the wife, after having signed a return, was held liable for one-half of the income tax. *E.g., United States* v. *Malcolm,* 1931, 282 U.S. 792, 51 S. Ct. 184, 75 L. Ed. 714; *Commissioner* v. *Hyman,* 5 Cir. 1943, 135 F. 2d 49; *Saenger* v. *Commissioner,* 5 Cir. 1934, 69 F. 2d 633. Since the

[4] *Poe* v. *Seaborn, supra; Bender* v. *Pfaff, supra.*

wife in those cases had signed a return she had assumed the liability for the tax. Therefore the issue of her liability for the tax was not in dispute.[5]

Mrs. Mitchell might have been held liable for the income taxes if she had accepted the benefits upon the dissolution of the community. She elected, however to renounce the community pursuant to Article 2410 of the Louisiana Civil Code which specifically provides that such renunciation exonerates her from all "debts contracted during the marriage." We are not persuaded by the Commissioner's assertion that the term "debts contracted during the marriage" should be limited to debts created by contract. In discussing the term "debts contracted" Planiol, 3 *Civil Law Treatise,* Part 1, § 1086 (1959) would read the term to mean debts incurred by any means, whether contract, tort or statute. This interpretation of the term is more in keeping with the purpose of the renunciation provision—to protect the wife's separate property from onerous debts of the community which the husband incurred and did not satisfy, factors over which the wife had no control.

Under Louisiana law, absent the willingness of the husband to divulge to the wife information concerning the financial status and affairs of the community, she has no way of knowing nor means to compel him to inform her of the community's assets, liabilities or income. She could neither prepare a return showing the community income nor pay the tax. She has no

[5] We are not convinced that *Smith* v. *Donnelly*, E.D. La. 1946, 65 F. Supp. 415 decided otherwise. There was no mention in *Smith* of a return but the court cited *Saenger* and *Hyman* as the only authority for its sweeping conclusion that the wife is liable for one-half of the income tax of the community.

power to guarantee that the community will be solvent enough to satisfy the tax liability.[6] As a result, if she is held liable for the income taxes, she may have no property with which to satisfy the debt unless the community is dissolved in a solvent state, a factor over which she has no control. Even if the community is solvent it is impossible for the wife to reach its assets until its dissolution because under § 2403 of the La. Civ. Code a separate debt (which is what the Commissioner is asserting against Mrs. Mitchell) may not be acquitted out of the community fund. Thus, as pointed out in *U.S.* v. *Robbins*, 1926, 269 U.S. 315, 328, 46 S. Ct. 148, 70 L. Ed. 285, "[T]he fund taxed, while liable to be taken for his debts, is not liable to be taken for the wife's * * * so that the remedy for her failure to pay might be hard to find." If Mrs. Mitchell had not fortuitously inherited property from her mother she would not have obtained any assets with

[6] Article 2404 of the Louisiana Civil Code requires that in order for the wife to have an action against the husband for fraudulent disposition of the community assets said disposition must be made with an "intent to injure the wife." As the United States Supreme Court pointed out in *Fernandez* v. *Wiener*, 1945, 326 U.S. 340, 349, n. 7, 66 S. Ct. 178, 90 L. Ed. 116: "Where the husband has aliened some part of the community in fraud of his wife's rights, she or those representing her have an action for reimbursement against the husband or his representatives upon the termination of the community, *but not before*, *Guice* v. *Lawrence*, 2 La. Ann. 226, 228. The fraud required for an action of this kind seemingly must be intentional and *the motive for the transaction*." [Emphasis supplied.]

See also Thigpen v. *Thigpen*, 231 La. 206, 91 So. 2d 12 (1956). Although the wife may obtain a judicial separation of property without dissolution of the marriage this remedy is difficult to obtain and somewhat illusory because the wife must show prior mismanagement and thus the funds may have already been dissipated.

which to satisfy the tax liability and the problem recognized in *Robbins* would have been real—Mrs. Mitchell would be liable for taxes for which she would be powerless to obtain the funds to pay.

Our holding does not leave the Commissioner without recourse. Under Louisiana law the husband is liable for the community debts that may be satisfied both out of the community and out of his separate property. *Poindexter* v. *Louisiana & A. Ry. Co.*, 170 La. 521, 128 So. 297 (1930); *Rouchon* v. *Rocamora*, 84 So. 2d 873 (La. Ct. App. 1956); *Gosserand* v. *Monteleone*, 164 La. 397, 113 So. 889 (1927). The rationale for this liability is not that the husband's ownership interest in the community should subject him to such liability but rather that as head and master of the community he should be liable for the debts he has incurred with respect to community property, and that it would be inequitable to require the creditor to distinguish between the community property and the husband's separate property. Note, *Creditor's Rights*, 25 La. L. Rev. 201 (1964).

The Commissioner's contention that Mrs. Mitchell incurred the statutory penalties under §§ 6651, 6653 and 6654 of the Code fails because she was under no duty to file a return under § 6012 of the Code since she had no separate income.

Since Mrs. Mitchell owes no tax obviously her transferee, Mrs. Jane Sims, does not either.

Reversed.

SIMPSON, Circuit Judge, dissenting:

I respectfully dissent.

I would affirm the Tax Court upon the basis of its opinion, reported at 51 T.C. No. 62.

APPENDIX A–2

In the United States Court of Appeals for the Fifth Circuit

October Term, 1939

No. 28163

T.C. Docket Nos. 6740–66 and 6741–66

ANNE GOYNE MITCHELL, PETITIONER-APPELLANT

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT-APPELLEE

JANE ISABELL GOYNE SIMS, PETITIONER-APPELLANT

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT-APPELLEE

APPEALS FROM THE DECISIONS OF THE TAX COURT OF THE UNITED STATES (LOUISIANA CASE)

Before AINSWORTH, DYER and SIMPSON, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the transcript of the record of the Tax Court of the United States, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the decisions of the

said Tax Court in this cause be, and the same are hereby reversed.

It is further ordered that respondent-appellee pay to petitioners-appellants, the costs on appeal to be taxed by the Clerk of this Court.

SIMPSON, *Circuit Judge*, dissenting.

Issued as Mandate: June 23, 1970.

APPENDIX A-3

In the Tax Court of the United States

ANNE GOYNE MITCHELL, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

JANE ISABELL GOYNE SIMS, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket Nos. 6740–66, 6741–66. Filed January 27, 1969

1. *Held,* that under the community property laws of Louisiana a wife has a present, vested interest in the income of the community and is therefore under a duty to make either a single or a joint return, and is liable for the tax on one-half of community income; and this is so, even though the wife subsequently renounces the community of acquets and gains and takes nothing therefrom. *Held, further,* that wife's failure to file a return was without reasonable cause and her failure to pay the tax was negligent. Determined penalty for underpayment of estimated tax is mandatory since statutory exceptions are not applicable, and such determination is upheld.

2. Parties agree that a prior assessment against wife and her husband was invalid and void as against wife. *Held,* the thrust of sec. 6404, I.R.C. 1954, is permissive, not mandatory, and respondent was not required to abate void assessment before making determinations herein.

3. *Held,* liability for tax on one-half of Louisiana community income is upon wife, and consequently her gratuitous transfer of her separate property to her sister, which transfer left her insolvent, makes the sister liable as a transferee.

Paul K. Kirkpatrick, Jr., for the petitioners.

Bruce A. McArdle, for the respondent.

FORRESTER, *Judge:* In these consolidated cases respondent has determined the following deficiencies in identical amounts against Anne Goyne Mitchell, petitioner in docket No. 6740–66, and against Jane Isabell Goyne Sims, petitioner in docket No. 6741–66, as transferee of the assets of Anne Goyne Mitchell:

Year	Income tax	Sec. 6651(a)	Sec. 6653(a)	Sec. 6654
1965	$323.00	$80.75	$16.15	0
1966	1,267.73	316.93	63.39	$35.49
1967	453.00	113.25	22.65	12.68
1968[1]	1,750.71	425.02	87.54	47.00
1969	871.34	173.24	43.57	17.27
	4,665.78	1,109.19	233.30	112.44

[1] For the years 1968 and 1969 credit has been allowed for $50.65 and $178.37, respectively. These amounts represent withholding from wages.

FINDINGS OF FACT

General

Some of the facts have been stipulated and are so found. The stipulation and exhibits attached thereto are incorporated herein by this reference.

Petitioner Anne Goyne Mitchell (hereinafter sometimes referred to as Anne) and petitioner Jane Isabell Goyne Sims (hereinafter sometimes referred to as Jane) each resided at Ruston, La., at the time of the filing of their respective petitions herein. Anne and Jane are sisters.

The issues for determination in docket No. 6740–66 are: (1) Whether Anne, on the basis of her interest

in community property under Louisiana law, is liable for income taxes on a one-half portion of the community income for the taxable years 1955 through 1959, inclusive, and additions to the tax thereto under sections 6651(a),[1] 6653(a), and 6654; (2) whether joint and several assessments that were void and invalid against Anne for Federal income taxes and additions thereto for the years 1954 through 1959, and not abated by the respondent, prevented determination of the deficiency herein; and (3) whether Jane (docket No. 6741–66) is liable as Anne's transferee for the deficiencies determined against her.

For convenience and clarity, we shall deal with each of the above issues separately.

Issue 1. Liability for One-half of the Community Income

FINDINGS OF FACT

On or about September 22, 1946, Anne married Emmett L. Mitchell, Jr. (hereinafter sometimes referred to as Emmett). Anne and Emmett were divorced on October 11, 1962.

During the existence of the marriage between Anne and Emmett, all of the income realized by either party was community income. Throughout the marriage of Anne and Emmett, finances were a constant source of trouble and controversy. At no time during the course of their marriage did Anne see her husband's paycheck or know how much money he made. Although Anne and Emmett had a joint bank account, and although Anne, with some degree of risk, drew checks on this account, she was rarely aware of the balances therein.

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[1] All references herein are to the Internal Revenue Code of 1954, unless otherwise stated.

Sometime in or after 1952, while Anne and Emmett were residing at Monroe, La., Emmett rented a post office box and retained the only key. Subsequent to the rental of the post office box, no mail was delivered to the Mitchell's home. When the Mitchells moved to Ruston, La., in 1956, Emmett again rented a post office box, and Anne was only aware of those bills and bank statements that Emmett chose to bring home. Emmett was financially irresponsible and Anne frequently attempted to bring to his attention those obligations she was aware of and that "needed to be taken care of in a financial way."

Anne was aware of her husband's fiscal irresponsibility, and repeatedly questioned him each year about the preparation of income tax returns. She believed that Emmett would file returns because of the consequences if he did not, which she assumed "would be immediate," but she was concerned about the returns being filed on time. Anne was led to believe that income tax returns were filed each year, because Emmett told her about getting help from Mr. Albritton, who was an accountant in Farmerville, Emmett's hometown; and securing the additional money allegedly needed to pay the taxes. Anne assumed not only that returns had been filed but that her signature had been affixed thereto by her husband. No income tax returns, however, were filed by either Anne or Emmett for the taxable years 1954 through 1959.

During 1955 and 1956 Anne was employed as a teacher by St. Paul's Methodist Church, receiving as salary (her community one-half) $1,350 and $750 respectively. Her actual receipts in such years were $2,700 and $1,500.

As a result of Emmett's continuing financial irresponsibility, Anne and Emmett began living separate and apart in July 1960. On or about August 4, 1961

Anne filed suit for separation from bed and board against Emmett, praying that, under Louisiana law, she be allowed to accept the community of aquests and gains with benefit of inventory. She was granted a separation from bed and board *a mensa et thoro*, against Emmett by default, on or about September 14, 1961. On September 18, 1961, she renounced the community of acquests and gains formerly existing between herself and Emmett, and on or about October 11, 1962, she was granted a judgment of divorce *a vinculo matrimonii*.

Upon the dissolution of the community of acquets and gains between Anne and Emmett, she received neither a distribution of community property nor a property settlement. Respondent, in his notice of deficiency, determined deficiencies against Anne for one-half of the community income for the tax years 1955 through 1959, and additions thereto under sections 6651(a), 6653(a), and 6654.

OPINION

In the case before us we are asked to decide whether in Louisiana, a community property State, one spouse is liable for the tax on one-half of all the income of the community irrespective of whose efforts produced the income for the community. In other words, in the absence of joint returns *must* one Louisiana spouse report one-half of the community income even though such income was earned by the efforts of the other spouse.

We hold that each spouse in Louisiana is responsible for tax on one-half of the community income regardless of whose efforts produced it.

In 1930, the U.S. Supreme Court decided that the community property laws in the States of Washing-

ton, Arizona, Texas, and Louisiana "entitled [a husband and wife] to file separate returns each treating one-half of the community income as his or her respective income."[2] *Poe* v. *Seaborn,* 282 U.S. 101 (1930); *Goodell* v. *Koch,* 282 U.S. 118 (1930); *Hopkins* v. *Bacon,* 282 U.S. 122 (1930); *Bender* v. *Pfaff,* 282 U.S. 127 (1930).

In *United States* v. *Malcolm,* 282 U.S. 792 (1931), the Court of Appeals for the Ninth Circuit had requested instructions from the Supreme Court on the following questions of law:

> 1. Under the applicable provisions of the Revenue Act of 1928 must the entire community income of a husband and wife domiciled in California be returned and the income tax thereon be paid by the husband?
>
> 2. Has the wife, under § 161(a) of the Civil Code of California such an interest in the community income that she should separately report and pay tax on one-half of such income?

In a per curiam opinion the Supreme Court answered the first question "no" and answered the second question "yes," citing *Poe* v. *Seaborn, supra; Goodell* v. *Koch, supra;* and *Hopkins* v. *Bacon, supra.*

Although *Poe* v. *Seaborn* and the related community property cases decided in 1930 stated that a husband and wife were entitled to file joint returns, it wasn't until our decision in *Paul Cavanagh,* 42 B.T.A. 1037 (1940), affd. 125 F. 2d 366 (C.A. 9, 1942), that it was decided she had a duty to return one-half of the com-

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[2] For almost 18 years income earned by a spouse who was domiciled in a community property State enjoyed the tax benefits of income splitting. In 1948 Congress, realizing the patent inequities between the marital unit in a community property State and a common-law State, amended the 1939 Internal Revenue Code by adding what is presently sec. 6013.

munity income. In *Cavanaugh*, we interpreted both the decision of *United States* v. *Malcolm*, *supra*, and section 22(a) of the 1934 Revenue Act (now sec. 61), to hold that a wife in California could not, *at her option*, return one-half of the income of the community, stating at pages 1043–1044:

> Gross income, as defined in section 22(a) of the Revenue Act of 1934, 48 Stat. 680, ch. 277, includes "income derived from * * * dealings in property, whether real or personal, growing out of the ownership or * * * interest in such property, * * * or gains or profits and income derived from any source whatever * * *." Such income must be reported by the individual to whom the statute attributes it. Clearly, therefore, the petitioner's wife is taxable on one-half of the community income. She is the owner thereof, although not entitled to present possession. This appears to be the inescapable conclusion to be drawn from the Supreme Court's opinion in the *Malcolm* case, *supra*.
>
> Consequently, there is no longer the situation whereunder the wife may at her option return one-half of the income. Since she now must do so, it follows that the petitioner is taxable only on the other half of the entire community property. Therefore, as to the second issue in this proceeding the Board holds in favor of the petitioner.

Again in *Marjorie Hunt*, 22 T.C. 228 (1954), we held, under the community property laws of California, that a spouse was liable for taxes on her one-half of the community income.

In the instant case we are concerned with the community property laws of Louisiana. Petitioners argue that: (1) Under Louisiana community property laws the wife does not have a sufficient interest in the community property to make her liable for tax on one-

half of its income; (2) Federal income taxes are community debts for which the husband is liable and a wife who renounces the community of acquets and gains is not liable for income taxes on community property; and (3) it would be unconstitutional to collect the community's taxes from a spouse who neither received community income nor voluntarily assumed the indebtedness.

We recognize that under the Louisiana community property system decisions may be found supporting the proposition that a wife has only an expectancy in the community property. See "Nature of the Wife's Interest During the Existence of the Community," 25 La. L. Rev. 159, 179–180 (1964); however, since the decision of *Phillips* v. *Phillips*, 160 La. 813, 107 So. 584 (1926),[3] the weight of authority in Louisiana has favored an ownership concept. *Bender* v. *Pfaff*, *supra*. We deem it proper to follow this authority. See *Commissioner* v. *Estate of Bosch*, 387 U.S. 456 (1967).

We think that the laws of Louisiana are overwhelming in their characterization of the wife's interest as more than a mere expectancy. The Louisiana Civil Code provides, *inter alia*, that "Every marriage * * * superinduces of right partnership or community of acquets or gains, if there be no stipulation to the contrary";[4] that a wife may bring an action against the heirs of her husband for a fraudulent disposition of

[3] In this case the Supreme Court of Louisiana said, 107 So. at 588: "The wife's half interest in the community property is not a mere expectancy during the marriage: * * * The title for half of the community property is vested in the wife the moment it is acquired by the community * * *, even though it be acquired in the name of only one of them."

[4] La. Civ. Code Ann. art. 2399 (West 1951). *Messersmith* v. *Messersmith*, 229 La. 495, 86 So. 2d 169 (1956).

the common property;[5] that she may petition for a separation of property when, due to her husband's mismanagement, her dowry is in danger or when, because of the disorderly conduct of her husband's affairs, she believes that his estate may not be sufficient to meet her rights and claims.[6]

We find that petitioners' position on this point is untenable and accordingly we hold that in Louisiana a wife has such rights, claims, and powers in the property of the marital community as are equivalent to ownership, and that she is responsible for the tax on one-half of the community income.

Petitioners contend that Anne's renunciation of the community of acquets and gains, on September 18, 1961, exonerated her from liability for Federal income taxes. In support of such contention they refer us to articles 2410 and 2411[7] of the Louisiana Civil Code; *Stuffler* v. *Puckett,* 30 La. Ann. 811 (1878); and *Brassac* v. *Ducros,* 4 Rob. 335 (1843).

These cases and statutes stand for the proposition that a wife and her heirs or assigns may "exonerate themselves from the *debts contracted* during the mar-

[5] La. Civ. Code Ann. art. 2404 (West 1951). *Thigpen* v. *Thigpen*, 231 La. 206, 91 So. 2d 12 (1956).

[6] La. Civ. Code Ann. art. 2425 (West 1951). *Brown & Learned* v. *Smyth*, 40 La. Ann. 325, 4 So. 300 (1888).

[7] Art. 2410. Exoneration of wife or heirs by renunciation of community.

Art. 2410. Both the wife and her heirs or assigns have the privilege of being able to exonerate themselves from the debts contracted during the marriage, by renouncing the partnership or community of gains.

Art. 2411. Rights of renouncing wife.

Art. 2411. The wife, who renounces, loses every sort of right to the effects of the partnership or community of gains.

But she takes back all her effects, whether dotal or extradotal.

riage by renouncing the partnership or community of gains." (Emphasis supplied.)

The complete answer is that the income tax is not a *debt created by contract, Bender* v. *Pfaff,* 38 F. 2d 649 (C.A. 5, 1930), and further, that Anne's renunciation came long after her liabilities for the annual income taxes here in issue had attached. The wife in Louisiana does not have an option to assume the tax liability resulting from the income of the community. *Smith* v. *Donnelly,* 65 F. Supp. 415, 417 (E.D. La. 1946); *Saenger* v. *Commissioner,* 69 F. 2d 633 (C.A. 5, 1934), affirming 28 B.T.A. 377 (1933); *Commissioner* v. *Hyman,* 135 F. 2d 49 (C.A. 5, 1943), affirming 46 B.T.A. 992 (1942).

Petitioners suggest that it would be unconstitutional to collect the community's taxes from a spouse who neither received community property, nor voluntarily assumed the indebtedness.

We are not unmindful that the Federal tax obligations of a wife in a community property State may be greater than those of her sister in a common-law State. But, this is not always the case for we hold only that the wife in a community property State must account for one-half of the community income, regardless of whose efforts produced such income.

Over a third of a century has elapsed since the Supreme Court decided *Poe* v. *Seaborn, supra,* wherein the Court, in passing upon the constitutional aspects of splitting community income, stated at pages 117–118:

> Finally the argument is pressed upon us that the Commissioner's ruling will work uniformity of incidence and operation of the tax in the various states, while the view urged by the taxpayer will make the tax fall unevenly upon married people. This argument cuts both ways.

> When it is remembered that a wife's earnings are a part of the community property equally with her husband's, it may well seem to those who live in states where a wife's earnings are her own, that it would not tend to promote uniformity to tax the husband on her earnings as part of his income. The answer to such argument, however, is, that the constitutional requirement of uniformity is not intrinsic, but geographic. * * * [citations] And differences of state law, which may bring a person within or without the category designated by Congress as taxable, may not be read into the Revenue Act to spell out a lack of uniformity. * * *

We find no reason why the constitutional precepts of *Poe* v. *Seaborn*, that were applicable in permitting community income to be split, should not be applicable in requiring the spouse to report and pay her tax on one-half of the community income.

In addition to the deficiency for one-half of the tax on the community income, respondent determined penalties against Anne under sections 6651(a) and 6653(a) for failure to file a tax return and for failure to pay the tax. Section 6651(a) provides for a 5-percent penalty per month of the tax due, but not in excess of 25 percent for failure to file a tax return "unless it is shown that such failure is due to reasonable cause and not due to willful neglect." We do not find wellful neglect in the instant case; however, it is well settled that a penalty under section 6651(a) is avoided only when there is, in addition to the absence of willful neglect, a reasonable cause. *Charles E. Pearsall & Son*, 29 B.T.A. 747, 749 (1934).

Petitioners argue that Anne had reasonable cause and that she was "not negligent unless she was under some affirmative duty to doubt her husband and independently verify his statements." We are sympa-

thetic to Anne's plight; however, we believe that she did not have reasonable cause. Anne neither saw the returns nor signed her name to them. It was certainly not reasonable simply to assume that her husband had signed her name to the returns, especially when she did not even attempt to verify the existence of said returns. As we said in *Leo Sanders,* 21 T.C. 1012, 1020 (1954), affd. 225 F. 2d 629 (C.A. 10, 1955), certiorari denied 350 U.S. 967 (1956):

> A wife required to file a return because of income of her husband in a community property State or who joins in a joint return can not shed the responsibility for delinquency by saying that she relied entirely upon her husband, not a specially qualified tax authority; otherwise Congress would be frustrated in the purpose behind section * * * [6651(a)].

We find that Anne is also liable for the penalties imposed under section 6653(a). This section provides for a 5-percent penalty on a deficiency when said deficiency, resulting from an underpayment, is due either to "negligence or intentional disregard of rules and regulations (but without intent to defraud)." The penalty imposed under this section is upon the total underpayment even though only part of the underpayment is due to negligence,* and the burden of proving that no part of the underpayment was due to negligence is upon petitioner. *Terry C. Rosano,* 46 T.C. 681, 688 (1966).

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* SEC. 6653. FAILURE TO PAY TAX.

(a) NEGLIGENCE OR INTENTIONAL DISREGARD OF RULES AND REGULATIONS WITH RESPECT TO INCOME OR GIFT TAXES.—If any part of any underpayment * * * is due to negligence or intentional disregard of rules and regulations (but without intent to defraud), there shall be added to the tax an amount equal to 5 percent of the underpayment.

Anne was under a duty to make either individual or joint income tax returns, secs. 6012 and 6013, and to pay a tax on her community one-half of the taxable income shown on these returns, secs. 1 and 2. Anne's failure to pay income taxes resulted from her failure to file returns and we have found that Anne demonstrated a lack of due care in assuming that her husband prepared and signed her name to these putative returns. Anne's conduct in failing to file income tax returns was also responsible for her failure to pay income taxes for the years in question. Therefore, we hold that Anne was negligent, and is liable for the 5-percent penalty on her share of the community income.

Respondent in his notice of deficiency determined that Anne was liable for additions to the tax under section 6654, which provides for an addition to the tax in the case of any underpayment of estimated tax by an individual. This section is mandatory unless certain exceptions (none of which are applicable in the instant case) relating to prior year's taxes, or payments, are complied with. It does not provide relief upon a showing of reasonable cause, lack of willful neglect, or extenuating circumstances. *Estate of Barney Ruben,* 33 T.C. 1071 (1960).

Anne does not come within any of the exceptions to section 6654 and is therefore responsible for additions to the tax under that section.

Issue 2. Existence of a Deficiency

FINDINGS OF FACT

Emmett and Anne did not file Federal income tax returns, either jointly or separately, for any of the taxable years 1954 through 1959. Form 870, "Waiver

of Restrictions on Assessment and Collection of Deficiency in Tax and Acceptance of Overassessment," covering these 6 taxable years was executed by Emmett on or about January 11, 1961. The execution of this form by Emmett permitted the Commissioner to make an assessment without complying with the time and notice (90 day) requirements of section 6213. The Federal income tax liabilities indicated on said Form 870 for all of the said taxable years were determined pursuant to the rates applicable to joint return filings. Predicated on the Form 870 executed by Emmett, Federal income taxes and penalties were jointly assessed on March 10, 1961, against both Anne and Emmett for the taxable years 1954 through 1959, inclusive.

The March 10, 1961, assessments were made without notice to, or the knowledge of Anne. Anne neither granted Emmett actual or implied consent nor authority or power to legally bind her to the Form 870. Anne neither acquiesced nor consented to being a participant or partner in the Form 870; nor did she consent or acquiesce to being obligate or bound by such Form 870 or any subsequent assessments thereunder.

Respondent concedes that the above joint and several assessments of Federal income taxes and additions to the tax, relative to the years 1954 through 1959 were invalid and void as against Anne.

Form 870, "Waiver of Restrictions on Assessment and Collection of Deficiency in Tax and Acceptance of Overassessment," covering the taxable year 1954 was executed by Anne on August 4, 1965. Predicated on such waiver, the Federal income tax, penalties, and interest were individually assessed against her for the taxable year 1954 on August 16, 1965, in the amount of $550.87. On December 30, 1966, Anne filed a claim

for refund for the above amount and on July 25, 1967, brought a refund action in the U.S. District Court for the Western District of Louisiana based upon her claim, which action is still pending.

On September 27, 1967, procedures of abatement were executed by the Internal Revenue Service with respect to the assessment of Federal income taxes, penalties, and interest, made on March 10, 1961, as it applied, in entirety, to Anne for the taxable years 1955 through 1959. On the same date, procedures of abatement were also executed by the Internal Revenue Service, with respect to the aforementioned assessment as it applied to Emmett, down to an amount which reflected the Federal income taxes, penalties, and interest against his one-half portion of the community income for the taxable years 1955 through 1959, inclusive.

OPINION

Petitioners argue that no deficiency exists under section 6211 (Definition of a Deficiency) because the respondent failed to abate the assessment made against Anne on March 10, 1961, pursuant to the execution of the waiver agreement (Form 870) executed by her husband on January 11, 1961. Respondent agrees that the assessments made on March 10, 1961, were invalid and void as against Anne.

As we understand petitioners, it is their contention that the void assessment must be abated by the respondent under section 6404 before there can be a valid deficiency under section 6211, since no deficiency can exist if the determination of the tax due is less than the amount previously assessed. We disagree.

As we read both the statute and the regulations promulgated under section 6211 and 6404, we find that the Secretary or his delegate is not required to abate an

invalid and void assessment in order to assert a deficiency. Of course there may be a question as to whether an assessment is invalid and void, but in the instant case petitioners and respondent are both in agreement on this point. "Section 6404 does not impose a duty on the District Director to abate improper assessments * * *. Its thrust is permissive, not mandatory." *Poretto* v. *Usry*, 295 F. 2d. 499, 501 (C.A. 5, 1961).

The fact that the assessment may have been valid against Emmett is of no consequence in the instant case, when Anne neither consented to the execution of Form 870 nor authorized Emmett to act on her behalf. Cf. *Marie A. Dolan*, 44 T.C. 420 (1965).

We hold that a valid and proper determination was made herein as against Anne.

Issue 3. Transferee Liability

FINDINGS OF FACT

Anniebel Taylor Goyne (hereinafter sometimes referred to as Anniebel), mother of Anne and Jane, died on November 5, 1964. On December 23, 1964, Anne conveyed all of the real estate inherited by her from her mother, to Jane.

On November 14, 1964, $2,402.78 was transferred from the account of Anniebel with the Ruston Building & Loan Association, to Anne's account with that same association. On December 23, 1964, Anne withdrew $2,676.81, the balance of her account, from the Ruston Building & Loan Association, and transferred to her sister, Jane, $1,721.21.

The above transfers to Jane were made without consideration, and there was no agreement between Anne and Jane for any retransfer.

On February 1, 1965, Anne executed Form 433–AB

("Statement of Financial Condition and Other Information") showing assets of $2,250 and liabilities of $1,081.20, exclusive of the deficiencies determined herein. A supporting statement to such Form 433-AB reads in part:

> On December 23, 1964 [I] transferred to my sister, Mrs. Jane G. Sims, without consideration the following:
>
> I. My undivided one half interest in the following real property which was acquired by inheritance from my mother in November, 1964:
>
> * * * * *
>
> | Description: | Value of my one-half interest in mother's succession |
> | --- | --- |
> | Total value of real property---- | $9,550.00 |
>
> II. Cash in savings account in Ruston Building & Loan Association, Ruston, La., $1,721.21.
>
> The foregoing assets were transferred to my sister on the recommendation of my attorney who had just closed my mother's succession in November, 1964, approximately one month prior to receipt on December 19, 1964, of the Final Notice Before Seizure for 1954 income tax.
>
> Prior to closing my mother's succession, I discussed with my attorney the matter of the income tax liability for 1954 through 1959. He advised that I could renounce my interest in the succession and thus pass my interest in mother's estate directly to my two children. However, as it had been over two years since I was contacted by Internal Revenue Agent, Deuel C. Smith, in regard to signing with my former husband on his Offer in Compromise, and I had heard nothing since, he felt that the matter was settled and therefore put me in possession. Then, after I received the Notice on December 19, 1964, he felt that to protect my interest, the foregoing assets should be transferred

which would leave me in the same financial status as if I had renounced my interest in mother's estate.

OPINION

Respondent in his notice of deficiency to Jane, determined that she was liable as a transferee of property from Anne for deficiencies in income taxes and the additions thereto determined against Anne and the taxable years 1955 through 1959.

Petitioners do not contest any of the basic facts, or Jane's liability as a transferee, except to argue:

> [Anne's] transfer was of her separate property. Since the liability for income taxes on the community income was a community debt which she [Anne] could not be required to satisfy out of her separate property, in view of her nonacceptance of the community; her transfer of separate property to Mrs. Sims cannot be said to * * * [constitute her] a transferee.

This is the identical argument made by the petitioners in issue 1, and we reject it for the reasons there expressed. Jane's liability as transferee will be computed in conformity with our holdings on the other issues.

Decisions will be entered under Rule 50.

APPENDIX B–1

In the United States Court of Appeals for the Fifth Circuit

No. 28154

MRS. FRANCES ANGELLO, WIDOW OF JACK SPARACIO, PLAINTIFF-APELLANT

v.

METROPOLITAN LIFE INSURANCE COMPANY, DEFENDANT-APELLEE

and

UNITED STATES OF AMERICA, INTERVENOR-APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

(June 22, 1970)

Before AINSWORTH, DYER and SIMPSON, *Circuit Judges*

DYER, *Circuit Judge:* This is a companion case to *Anne Mitchell* v. *Commissioner,* 5 Cir. 1970, —— F. 2d ——, No. 28,163, decided this day. Essentially the same question is posed in both cases, *i.e.,* under Louisiana community property law is the wife's interest in the community of such a character that her separate property is liable for one-half of the income taxes due on the community income. The District Court found that "each spouse is liable for one-half of the federal income taxes related to Community income," and entered judgment for the Government. We reverse.

Appellant, Mrs. Frances Sparacio Angello, was the wife of Jack Sparacio from 1959 through 1961 and resided in Louisiana under the community of acquets and gains. No income tax returns were filed for those years. On February 19, 1965, the District Director of Internal Revenue made an assessment against Mrs. Angello and her husband for federal income tax liabilities for those years in the amount of $12,239.27. Based upon these assessments the United States, on April 13, 1965, filed a Notice of Federal Tax Lien with the Recorder of Mortgages, Parish of New Orleans. On April 30, 1965, a notice of levy demanding all property in its possession belonging to the Sparacios was addressed to the Metropolitan Life Insurance Company, which had issued a policy to Jack Sparacio with a face value of $2,000, Mrs. Angello being the revocable beneficiary.

Jack Sparacio died on March 11, 1966. Mrs. Angello completed the necessary forms and filed a claim for the proceeds of the policy with the insurer. Metropolitan refused to pay the proceeds to Mrs. Angello because of the lien and levy served upon it by the United States.

Mrs. Angello then brought this action in the state court against Metropolitan seeking the proceeds. The United States intervened and upon its motion the case was removed to the Federal District Court. After removal Metropolitan paid the proceeds into the court registry and was dismissed from the case.

On August 5, 1968, the Director of Internal Revenue made an abatement of its previous assessment and is now claiming the amount of $3,902.94 on a theory of imputation of Mrs. Sparacio of one-half of the community income from her husband's business for the years in question.

Both Mrs. Angello and the government moved for summary judgment. The Court granted the government's motion and held Mrs. Angello indebted to the United States for $4,570.18 representing the income taxes due on her one-half of the community income for 1959 through 1961 computed on a separate return basis and interest accrued thereon through August 5, 1968. The federal tax lien was foreclosed against the interpleaded funds. This appeal followed.

The government contends that for federal income tax purposes a husband and wife domiciled in Louisiana, a community property state, are to be treated as separate taxpayers as to their respective portions of the community income, and the tax liability for one-half of the community income is the wife's personal obligation and thus can be satisfied out of her separate property.

In *Anne Mitchell* v. *Commissioner*, 5 Cir. 1970,— F. 2d —, [No. 28, 163 ———], we held that under Louisiana law the wife's interest in the community is of such a character that she is not personally liable out of her separate property for income taxes due on community income because the liability for such taxes is a community obligation and does not become her separate obligation unless she expressly accepts such liability or accepts the benefits of the community upon its dissolution.[1] Thus *Mitchell* is dispositive of this issue.[2]

The only distinction between this case and *Michell* is that here the premiums for the policy were paid

[1] The government does not contend nor is there any mention in the record, that Mrs. Angello accepted the benefits of the community.

[2] We do not iterate the authorities undergirding our decision in *Mitchell*.

with community funds. But this is a distinction without a difference because the insurance proceeds are not community property but are the separate property of the wife under Louisiana law even though the insurance premiums were paid with community funds. *Newman* v. *Commissioner*, 5 Cir. 1935, 76 F. 2d 449. *Successions of George and Frances Clark*, 27 La. Ann. 269 (1875).

Since the obligation for income taxes was a community obligation, the separate property of the wife could not, in the circumstances of this case, be reached for its satisfaction. The judgment of the District Court is

Reversed.

SIMPSON, *Circuit Judge*, dissenting:

I respectfully dissent.

I agree with the majority that the issue raised on this appeal is governed by *Anne Goyne Mitchell* v. *Commissioner of Internal Revenue*, 5 Cir. 1970, —— F. 2d —— [No. 28,163, decided ———]. See my dissent in that case which is based on the holding of the Tax Court reported at 51 T.C. No. 62.

The issue involved in the present case was in my judgment correctly decided by the court below on the basis that under Louisiana law each spouse is liable for one-half of the federal income taxes related to community income. See the following cases: *Bender* v. *Pfaff*, 1930, 282 U.S. 127, 51 S. Ct. 64, 75 L. Ed. 252; *Commissioner of Internal Revenue* v. *Hyman*, 5 Cir. 1943, 135 F. 2d 49; *Smith* v. *Donnelly*, E.D. La. 1946, 65 F. Supp. 415; *Saenger* v. *Commissioner*, 5 Cir. 1934, 69 F. 2d 633.

I would affirm the judgment of the district court.

APPENDIX B–2

United States Court of Appeals for the Fifth Circuit,
New Orleans, La.

October Term, 1969

No. 28154

D.C. Docket No. CA 66–884–A

MRS. FRANCES ANGELLO, WIDOW OF JACK SPARACIO, PLAINTIFF-APPELLANT

v.

METROPOLITAN LIFE INSURANCE COMPANY, DEFENDANT-APPELLEE

and

UNITED STATES OF AMERICA, INTERVENOR-APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

Before AINSWORTH, DYER and SIMPSON, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed.

It is further ordered that defendant-appellee and intervenor-appellee pay to plaintiff-appellant, the costs on appeal to be taxed by the Clerk of this Court.

SIMPSON, *Circuit Judge,* dissenting.

Issued as Mandate: June 22, 1970.

APPENDIX B-3

In the United States District Court for the Eastern District of Louisiana

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Filed: June 5, 1969)

Patrick M. Schott, Esq., Attorney for Plaintiff.

Phelps, Dunbar, Marks, Claverie & Sims, Attorneys for Defendant.

Charles H. White, Esq., Assistant United States Attorney, Attorney for Intervenor.

CHRISTENBERRY, *District Judge:*

This suit was instituted by Mrs. Frances Angello, widow of Jack Sparacio, as beneficiary of Insurance Policy No. 620 965 303 E1 issued by the defendant, Metropolitan Life Insurance Company, on the life of her husband. The United States of America intervened in this suit to collect income taxes allegedly owed by the plaintiff. The defendant deposited the proceeds of the insurance policy ($1,913.88) in the registry of the Court, and by agreement of the parties a motion for summary judgment was granted as to the Metropolitan Insurance Company only.

On a former day this cause came on for hearing on motion of the intervenor, United States of America, for summary judgment in its favor allowing it to foreclose the tax lien upon the fund of $1,913.88, now on deposit in the registry of the Court; and on cross motion of plaintiff, Mrs. Frances Angello Sparacio, for summary judgment in her favor dismissing the claim of the intervenor to the fund on deposit.

Now, after considering the pleadings, the memoranda and arguments of counsel, the Court makes the following:

Findings of Fact

1. On February 19, 1965, the District Director of Internal Revenue made assessments against Mr. Jack Sparacio and Mrs. Frances Angello Sparacio for federal income tax liabilities for the years 1959, 1960 and 1961 in amounts totaling $12,239.27. Notice of the assessments and demand for payment were made upon Mr. and Mrs. Sparacio on the same day.

2. At all times relevant, the plaintiff, Mrs. Frances Angello Sparacio, was the wife of Jack Sparacio.

3. Jack Sparacio died on March 11, 1966, and the District Director of Internal Revenue imputed to Mrs. Sparacio one-half of her husband's income for the subject years, and computed her tax liability to be $4,570.18, including interest accrued through August 5, 1968.

4. The sum of $1,913.88, proceeds from Policy No. 620 965 303 E1, was deposited in the registry of the Court by the Metropolitan Life Insurance Company.

5. The plaintiff claims the proceeds now in the registry of the Court as the beneficiary of the insurance policy.

6. The plaintiff denies the tax liability and has made no payment on the alleged indebtedness.

Conclusions of Law

1. The Court has jurisdiction of the parties and of the subject matter of this cause and venue is properly laid in the Eastern District of Louisiana. The cause falls within the original jurisdiction of this Court as provided in Title 28, United States Code, Section 1346(e).

2. In Louisiana, each spouse is liable for one-half of the federal income taxes related to community income. *Bender* v. *Pfaff*, 282 U.S. 127 (1930); *Commissioner of Internal Revenue* v. *Hyman*, 135 F. 2d 49 (5 CCA 1943); *Smith* v. *Donnelly*, 65 F. Supp. 415 (E.D. La. 1946); *Saenger* v. *Commissioner*, 69 F. 2d 633 (5 CCA 1934).

3. The plaintiff is indebted to the United States of America in the amount of $4,570.18, which represents one-half of the income taxes due on her share of the community income for the taxable periods 1959, 1960 and 1961, including interest accrued through August 5, 1968.

4. Accordingly, *It is ordered* that the motion of intervenor, United States of America, for summary judgment allowing it to foreclose the tax liens upon the fund of $1,913.88, now on deposit in the registry of the court be and the same is hereby *Granted.*

It is further ordered that the cross motion of plaintiff, Mrs. Frances Angello, widow of Jack Sparacio, for summary judgment dismissing the claim of the United States of America be and the same is hereby *Denied.*

Judgment will be entered accordingly.

New Orleans, Louisiana, this 5th day of June, 1969.

/s/ HERBERT W. CHRISTENBERRY,
United States District Judge.

JUDGMENT

(Number and Title Omitted)

The Court having, on June 7, 1969, granted the motion of defendant, United States of America, to dismiss and having, on May 6, 1968, granted the motion of defendant, Metropolitan Life Insurance Com-

pany, for summary judgment and having, on March 28, 1969, granted the motion of intervenor, United States of America, for summary judgment and having denied plaintiff's cross motion for summary judgment and considering the written reasons of the Court on file herein, and considering the direction of the Court as to entry of judgment;

Accordingly, *It is ordered, adjudged and decreed* that there be judgment in favor of defendants, Metropolitan Life Insurance Company and the United States of America, and against plaintiff, Mrs. Frances Angello, widow of Jack Sparacio, dismissing her suit with costs.

It is further ordered, adjudged and decreed that there be judgment in favor of intervenor, United States of America, allowing it to foreclose the tax lien upon the fund of $1,913.88, now on deposit in the registry of the Court.

New Orleans, Louisiana, this 27 day of June, 1969.

/s/ A. Dallam O'Brien, Jr.,
Clerk.

Approved as to form:

/s/ Herbert W. Christenberry,
United States District Judge.

Notice of Appeal

(Number and Title Omitted)

(Filed: July 8, 1969)

Notice is hereby given that Mrs. Frances Angello Sparacio, plaintiff above named, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the Judgment in favor of defendants, Metropolitan Life Insurance Co., and the United States of America against plaintiff, Mrs. Frances

Angello widow of Jack Sparacio, dismissing her suit with costs and in favor of intervenor, United States of America, allowing it to foreclose its tax lien upon the fund of $1,913.88 now on deposit in the registry of the Court, entered in this action on the 30th day of June, 1969.

REUTER, REUTER & SCHOTT,[1]
By /s/ PATRICK M. SCHOTT,
Trial Attorney.

[1] Attorneys for Mrs. Frances Angello Sparacio, 1607 National Bank of Commerce Bldg., New Orleans, La. 70112.

U.S. GOVERNMENT PRINTING OFFICE: 1970